IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 77-991 and 77-5999

Supreme Court, U. S.
FILED
AUG 28 1978
MICHAEL RODAK, JR., CLERK

JOSEPH A. CALIFANO, Jr., SECRETARY OF HEALTH, EDUCATION, AND WELFARE,

Appellant,

v.

GRACE AZNAVORIAN, ETC.

GRACE AZNAVORIAN, ETC.,

Appellant,

v.

JOSEPH A. CALIFANO, Jr., SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR GRACE AZNAVORIAN, ETC.

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OPINION BELOW

The opinion of the district court (J.S. App. 1A-33A)[1] is reported at 440 F.Supp. 788.

[1] "J.S. App." refers to the appendix to the Secretary's jurisdictional statement in No. 77-991.

JURISDICTION

The district court's order was entered on August 23, 1977 (J.S. App. 34A-38A) and its judgment on September 5, 1977. (J.S. App. 39A-40A.) The Secretary's notice of appeal to this Court was filed on September 22, 1977 (J.S. App. 41A) and Aznavorian's notice of cross-appeal was filed on October 4, 1977. (No. 77-5999 J.S. App. 41a-42a.) On March 20, 1978, the Court noted probable jurisdiction on both appeals and consolidated the cases.[2] The Courts jurisdiction rests on 28 U.S.C. § 1252.

QUESTIONS PRESENTED

1. Whether Section 1611(f) of the Social Security Act violates the Due Process Clause of the Fifth Amendment by denying Supplemental Security Income benefits to otherwise eligible recipients and thereby unduly infringing their rights to international travel.

2. Whether sovereign immunity bars recovery of unconstitutionally denied Supplemental Security Income benefits.

3. Whether the district court erred in denying relief to those class members not applying or ineligible for Supplemental Security Income benefits on the date of the class relief order.

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[2]By agreement between the parties, this opening brief addresses the issues on both appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

Section 1611(f) of the Social Security Act, 42 U.S.C. (Supp. V) § 1382(f), provides:

> Notwithstanding any other provision of this title, no individual shall be considered an eligible individual for [Supplemental Security Income benefits] * * * for any month during all of which such individual is outside the United States (and no person shall be considered the eligible spouse of an individual for purposes of this title with respect to any month during all of which such person is outside the United States). For purposes of the preceding sentence, after an individual has been outside the United States for any period of 30 consecutive days, he shall be treated as remaining outside the United States until he has been in the United States for a period of 30 consecutive days.

Section 1631(b) of the Social Security Act, 42 U.S.C. (Supp. V) § 1383(b), provides in pertinent part:

> Whenever the Secretary finds that more or less than the correct amount of benefits has been paid with respect to any individual, proper adjustment or recovery shall, subject to the succeeding provisions of this subsection, be made by appropriate adjustments in fugure payments to such individual or by recovery from or payment to such individual or his eligible spouse (or by recovery from the estate of either).

Section 1631(c)(3) of the Social Security Act, 42 U.S.C. (Supp. V) § 1383(c)(3), provides:

> The final determination of the Secretary after a hearing [on eligibility for or the amount of Supplemental Security Income benefits] * * * shall be subject to judicial review as provided in section 405(g) of this title to the same extent as the Secretary's final determinations under section 405 of this title.

Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), provides in pertinent part:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. * * * * The court shall have power to enter * * * * a judgment affirming, modifying, or reversing the decision of the Secretary * * *.

STATEMENT

The Supplemental Security Income Program

Like millions of the nation's aged, blind and disabled poor, Grace Aznavorian depends for her basic necessities of life on the benefits she receives under the Supplemental Security Income program ("SSI"). Social Security Act ("Act"),

Section 1601 *et seq.*, 42 U.S.C. § 1381 *et seq.* On January 1, 1974, the SSI program replaced several welfare programs for the aged, blind and disabled, which were jointly funded by the federal and state governments and administered by the states. These programs contained differing eligibility requirements and widely varying benefit levels. H.R. Rep. No. 231, 92 Cong., 1st Sess. 147, 150 (1971). SSI created a single system of guaranteed minimum monthly payments to these people under uniform federal eligibility requirements administered by the Secretary of Health, Education and Welfare.

To be eligible for SSI, an individual must be 65 years old, or met the statutory definitions of blindness or disability (§ 1614(a), 42 U.S.C. § 1382c(a)), and be poor as defined by standards in the SSI statutes and the Secretary's regulations. Section 1612, 42 U.S.C. § 1382a (income); Section 1613, 42 U.S.C. § 1382b (resources); 20 C.F.R. §§ 416.1101-.1190. In general, an individual must have a monthly income less than the SSI grant and can have no more than $1,500 in resources. A recipient must also be a resident of the United States. Section 1614(a)(1)(B), 42 U.S.C. § 1382c(a)(1)(B).

An eligible person receives a monthly benefit from the SSI program (§ 1611(b)(1), 42 U.S.C. § 1382(b)(1)), which is periodically adjusted upward with the cost of living in conjunction with raises in Title II (Social Security) benefits. Section 1617, 42 U.S.C. § 1382f. Currently the federal monthly grant is $189.40. Social Security Claims Manual ("CM") § 13127.

Mrs. Aznavorian began receiving SSI disability benefits in January, 1974. Her monthly grant was $146.00 (§ 1611(b)(1), 42 U.S.C. § 1382(b)(1)) and was her sole source of support. (Appendix ("A") 12, 22.)

The Operation of Section 1611(f)

With 8 million other Americans (1975 *Annual Report,* Immigration and Nationalization Service 32), Mrs. Aznavorian made a trip abroad in 1974. On July 24, she left her home in San Diego for Guadalajara, Mexico to obtain medical treatment. At the time of her departure, she did not intend to spend more than a month in Mexico. She became ill in Guadalajara and was unable to return to the United States until September 1, 1974. Consequently, she was out of the country for 38 consecutive days. She never intended to abandon her United States residence. (J.S. App. 2A-3A.)

Because she remained outside the United States from July 25 to September 1, the Secretary did not pay her SSI benefits for August and September 1974 pursuant to the provisions of § 1611(f). (J.S. App. 3A.) That section conclusively presumed that Mrs. Aznavorian had abandoned her residence in the United States when she remained outside the country for the calendar month of August. Because she was away for 30 consecutive days[3], it also conclusively presumed that she could not reacquire her residence for the first 30 days following her return to San Diego. Literally, § 1611(f) states that she is "treated as remaining *outside* the United States until . . . [she] . . . has been *in* the United States for a period of 30 consecutive days." (emphasis added). She consequently lost her sole source of income for a two month period.

Anna Tolstick was born in Galicia, Russia in 1896. (R. 341-344.) She came to the United States in 1921 and had four children here. In 1976, at the age of 79, 55 years after leaving Russia, she wanted to visit her one living sister

[3]Hereafter, when we refer to both the "calendar month" and the "30 consecutive days," we use the term "month."

in Ukraine, U.S.S.R. and her homeland for a last time before she died. She believed that her trip would take two months. Because she was an SSI recipient, she inquired at her local Social Security office about receiving her benefits during the trip. She was advised that she would in fact lose three months of benefits if she took the planned two month trip. For that reason, she has not made the journey.

Bestabe Rivas was born in Cali, Colombia in 1895. (R. 345-349.) In 1963 she immigrated to the United States where all but one of her children live. Like Mrs. Tolstick, at 81 she wanted to visit her daughter and grandchildren and her homeland once before she died. Her inquiry at the local Social Security office met with the response that she would forfeit three months of SSI benefits if she made the two month trip. To avoid the consequences of such a loss, she gave up her planned trip.

To many Americans foreign travel is important. It is hardly surprising that many residents in this land of immigrants want to maintain or revive family ties, search for their roots or do the myriad other things which tie this country's people to the rest of the world. It is even more crucial for many SSI recipients. The intensity of desire for such travel is typical of persons of advancing age. *See* Laxalt, *Sweet Promised Land* (1957). Travel for SSI recipients is certainly not easy: they must save, often for a long time, travel by the cheapest means of transportation, and live frugally. Yet the purposes make the effort worthwhile.

Section 1611(f) makes such trips practically impossible for people in the precarious circumstances of the aged, blind and disabled poor who must rely on SSI to avoid poverty. By denying SSI for taking any journey lasting a month, many, like Tolstick and Rivas, do not travel because they cannot afford to lose their SSI: they must continue to pay certain

fixed expenses in the United States like rent and utilities. Given the special vulnerability of their age and disability, they need the shelter and security of their home immediately on their return. (R. 342, 346.) Others, like Mrs. Aznavorian now, will not even venture on a short trip out of fear that an unforseen illness, a missed flight, or any other unpredictable event may delay their return to the United States and cause the forfeiture of their SSI.

A SSI recipient always loses SSI benefits under §1611(f) whenever he travels abroad for a month based on the assumption that he has abandoned his United States residence. It is absolutely irrelevant that while abroad, he maintains his old residence in the United States, pays rent or a mortgage payment, utilities, retains a job or shows any of the other objective indicies of his intent to remain a United States resident. Section 1611(f) conclusively presumes that he has abandoned his United States residence for a trip of a calendar month or longer, and cannot reestablish it without waiting at least 30 days once he returns, whenever his trip lasts 30 consecutive days. The Secretary has no statistics or information to determine whether this provision is substantially or in any manner related to the abandonment or reacquisition of United States residency. (J.S. App. 19A; A 38-39.)

The extent of the penalties under § 1611(f) is often fortuitous. If a recipient makes a trip of 29 days, from January 31 to March 2, two full months of benefits are lost. If instead he leaves the country on July 1, and returns on August 31, a trip of 60 days, he loses one month of benefits. If he is gone for 28 days in February, he loses a month of benefits; if he is gone for 29 in March, he loses none.

Administrative and Judicial Proceedings Below

Mrs. Aznavorian unsuccessfully sought reversal of the Secretary's decision on administrative reconsideration, hearing and Appeals Council review. (A 14-15, 22.) After exhausting her administrative remedies, she filed this action under §§ 205(g) and 1631(c) (42 U.S.C. §§ 405(g) and 1383(c)) on behalf of herself and a nationwide class of similarly affected SSI recipients, to declare § 1611(f) in violation of the due process and equal protection guarantees of the fifth Amendment, reverse the Secretary's decision denying their SSI benefits and to recover those benefits upon proof of continued United States residency at an administrative proceeding. Mrs. Tolstick and Mrs. Rivas moved to intervene in the Aznavorian litigation. (R. 93-113, 311-358.)

The district court found that all the class members individually satisfied the requirements of § 205(g) of the Act (J.S. App. 4A); § 205(g) did not preclude class actions (*id.*, 5A-7A);[4] and the proposed class satisfied the requirements of Federal Rule of Civil Procedure 23(a) and (b)(2). (*Id.*, 7A-10A.) It then certified the following class:

> All individuals otherwise eligible for Supplemental Security Income, who have had such SSI denied, suspended, terminated, or interrupted pursuant to an initial written determination, an administrative reconsideration, an administrative hearing, or an Appeals

[4]The Secretary has expressly waived the issue of whether class actions may be maintained under § 205(g). (Sec. Bf., 8 n.6.) We believe that the Court can decide the remaining issues without determining the class question. Accordingly, we have not briefed the issue here. If the Court requests, we will brief the issue and note that we have addressed it in our Motion to Affirm in No. 77-5999, 17-21. We have cited a few cases approving § 205 class actions. *See, infra*, 65 n.20.)

> Council review, based solely on 42 U.S.C. § 1382(f) and regulations promulgated thereunder from September 26, 1975 until the entry of this Order [August 23, 1977]. (*Id.*, 34A-35A.)

The court denied the intervenors' motions on the ground that they had not yet presented a "claim" to the Secretary for purposes of the non-waivable jurisdictional component of § 205(g). (*Id.*, 10A-11A.)

The district court then held that § 1611(f) violated the due process and equal protection guarantees of the Fifth Amendment. It reasoned that § 1611(f) penalized SSI recipients for exercising their "basic constitutional right" to travel outside the United States by denying them need-based welfare benefits for any trip lasting one calendar month or longer. (J.S. App. 12A-14A.) Given this infringement on the right to international travel, the court ruled that § 1611(f) had to bear a "fair and substantial relationship in fact" to the Secretary's asserted purpose of the statute of limiting SSI to United States residents, relying on the test set out in *Aptheker v. Secretary of State,* 378 U.S. 500, 509 (1964) and *Reed v. Reed,* 404 U.S. 71, 76 (1971).[5] (*Id.*, 15A-16A and n.8.) It ruled that § 1611(f) fell far short of this standard, especially as (1) the Secretary had no evidence whatsoever to demonstrate the required relationship (*id.*, 19A) and (2) there were other administrative means being utilized to accomplish that objective without infringing on the right to travel abroad. (*Id.*, 17A-23A.)[6]

[5]In his statement, the Secretary incorrectly implies that the district court relied solely on *Reed*. (Sec. Bf., 7.)

[6]Again, the Secretary incorrectly suggests that the district court invalidated § 1611(f) on the insufficiency of his administrative convenience rationale alone. (Sec. Bf., 8.)

The district court ordered the Secretary to pay Mrs. Aznavorian her suspended SSI benefits for August and September 1974, based on the undisputed facts in the administrative record that she remained a resident of the United States during her trip to Mexico. (J.S. App. 32A-33A.) It granted relief to all class members who were receiving SSI benefits on the date of its order (August 24, 1977) or would have been receiving them but for the operation of § 1611(f). (*Id.*, 31A-32A.) It reversed the Secretary's administrative decisions of these class members (hereafter "appellee class members") and ordered him to notify them of their right to establish retention of their United States residency by the proper constitutional standards at further administrative proceedings and to pay them benefits if they could do so. (*Id.*, 29A-30A.) The court reasoned that sovereign immunity did not bar this relief because §§ 205(g) and 1631(c) (42 U.S.C. §§ 405(g); 1383(c)) authorized the recovery of wrongfully denied SSI at an administrative hearings.[7]

The court denied any relief to two subclasses of the certified class: (1) individuals eligible for, but not having current applications for SSI on the date of the court's order and (2) individuals no longer eligible for SSI on that date (hereafter collectively "appellant class members"). (J.S. App. 31A-32A.) It reasoned that recovery of wrongfully withheld SSI benefits is limited by statute to "currently needy" persons, and alternatively that it had discretion to fashion such class relief. it then entered its judgment on the foregoing opinion and order. (*Id.*, 39A-40A.)

[7]The district court did not rule that sovereign immunity was inapplicable because the relief was limited to "currently needy" class members as the Secretary states. (Sec. Bf., 11.) The Secretary apparently confuses the sovereign immunity issue with the limitation on class relief question.

On February 28, 1978, the district court partially stayed its judgment pending this Court's decision. (A 56-58.) It relieved the Secretary of his obligation to notify the designated class members, conduct administrative re-determinations on residency and pay benefits to any eligible members.

SUMMARY OF ARGUMENT

I.

Section 1611(f) violates the Due Process Clause of the Fifth Amendment because it unduly interferes with the right of SSI recipients to travel abroad without substantially accomplishing its intended purposes. Americans have always exercised the right to travel abroad free of governmental interference except that justified by the weightiest considerations of national security or foreign policy. This basic liberty stems from its recognition and exercise under the common law and our colonial heritage, and after the ratification of the Constitution. A statute which indirectly burdens or interferes with the exercise of a constitutional right, infringes that right and hence implicates it in a constitutional analysis of the statute. By denying need-based benefits to SSI recipients who rely on them for their basis subsistence, § 1611(f) infringes their constitutional right to travel abroad by deterring and penalizing its exercise.

The standard for reviewing statutes infringing on the right to international travel requires that the restrictions be supported by weightiest governmental interests and cannot

be achieved by means which sweep unnecessarily broadly when others are available. *Kent v. Dulles,* 357 U.S. 116 (1958); *Aptheker v. Secretary of State,* 378 U.S. 500 (1964); *Zemel v. Rusk,* 381 U.S. 1 (1965). Common to all cases was a clear recognition of the special importance of the right to travel abroad, and counterposed against this crucial aspect of personal freedom were the broad and fundamental interests of the federal government in directing the nation's foreign policy and securing the national defense.

The first sentence of § 1611(f) creates a conclusive presumption of abandonment of United States residency for any trip abroad for a calendar month or more. There is no meaningful legislative history and no administrative experience to support the factual bases of this presumption. Given the financial means and reasons why SSI recipients travel, the factual assumptions are not even supported by common experience. The Secretary has convenient alternatives for determining loss of residency by foreign travel and the presumption does not prevent fraud.

The second sentence of § 1611(f) precludes recipients who have returned from showing that they are United States residents for 30 days. Like the abandonment provision, the factual assumptions of this provision are not supported by any legislative history, administrative or common experience. It is no more administratively convenient than the procedures the Secretary uses to determine United States residency. It doubles the penalties on those who travel abroad for a calendar month, and does not prevent fraud.

The two other claimed purposes of § 1611(f) – preventing recipients from obtaining "windfalls" while traveling abroad and reinforcing the "need" requirements – are not real legislative objectives of that provision. If they were, they are not achieved by the use of the broad and sweeping pre-

sumptions of abandonment and reacquisition of residency found in § 1611(f).

II.

Because § 1611(f) is unconstitutional, the district court properly granted the relief to Mrs. Aznavorian and her appellee class members authorized by §§ 205 and 1631. It reversed the Secretary's unconstitutional SSI denials and remanded recipients' claims for an administrative opportunity to prove they in fact retained their United States residences during their brief trips. Recipients successful at these proceedings may recover their unconstitutionally denied payments under § 1631(b). Sovereign immunity does not bar this relief because courts have been granting it for decades, specifically holding that §§ 205 and 1631 constitute waivers of sovereign immunity. Neither the statutes nor the cases make any exception for the recovery of benefits denied under an unconstitutional provision.

III.

The district court refused all relief to the appellant class members. By the class definition all these class members submitted timely claims for relief in the district court under §§ 205(g) and 1631(c)(3), and were denied their SSI entitlement by virtue of § 1611(f). Appellant class members belong to one of two subclasses: (1) eligible individuals not having current applications for SSI on the date of the district court's final order (August 23, 1977); and (2) individuals no longer eligible for SSI on that date. Together, §§ 205(g) and

1631(b), (c), impose obligations (1) on the district court at least to grant a remand for an administrative rehearing to an individual otherwise eligible for SSI when benefits were illegally denied, and (2) on the Secretary to pay those wrongfully denied benefits to such an individual. By denying relief to these class members, the court effectively imposed on them additional requirements for securing judicial relief and recovery of underpayments pursuant to §§ 205(g) and 1631(b), (c), that are nowhere found in these statutes and indeed conflict with them. Assuming, arguendo, that the district court had some discretion to weigh equities in determining whether to grant appellants relief, refusing all relief was an abuse of discretion.

ARGUMENT

I.

SECTION 1611(f) VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT BY UNDULY INFRINGING SSI RECIPIENTS' RIGHT TO INTERNATIONAL TRAVEL.

The district court ruled that enforcement of § 1611(f) violated the Due Process Clause of the Fifth Amendment by unduly infringing the basic constitutional right to international travel. (J.S. App. 20A.) The Secretary argues that § 1611(f) has no constitutionally relevant impact on the right to international travel (Sec. Bf., 16-21) and thus the provision should be upheld as rationally related to restricting SSI to needy, United States residents. (*Id.*, 21-27).

However, Americans have always exercised the right to foreign travel free of government restrictions except those justified by the weightiest considerations of national security or foreign policy. (Part I.A, *infra.*) Section 1611(f) interferes with that right by deterring and penalizing its exercise. (Part I.B, *infra.*) This Court has recognized the right to travel as a "basic constitutional" liberty, and has carefully scrutinized the nature and need for any governmental infringement on its exercise. (Part I.C, *infra.*) Section 1611(f) contains sweeping presumptions of abandonment of United States residency that are without any factual or rational support; that do not substantially achieve their intended purposes; and that could be more narrowly drawn using existing administrative procedures to avoid unduly infringing SSI recipients' right to travel abroad. (Part I.D., *infra.*)

A. The Right To International Travel Is A Basic Liberty Rooted In Our Nation's History And Traditions.

The right to international travel, like the right to interstate travel, is not explicitly mentioned in the Constitution. Yet, consistent with our common law and colonial heritage, Americans have always exercised the right to travel abroad and return, free of governmental interference except that justified by the weightiest considerations of national security or foreign policy. Thus rooted in the "[n]ation's history and tradition" (*Moore v. City of East Cleveland,* 431 U.S. 494, 503 (1977)), the Court has consistently protected this basic liberty under the Fifth Amendment. *See Kent v. Dulles,* 357 U.S. 116, 125-27 (1958); *Aptheker v. Secretary of State,* 378 U.S. 500, 505-06 (1964); *Zemel v. Rusk,* 381 U.S. 1,

14 (1965). The historical bases of the right stem from its recognition and exercise (1) under English common law, (2) the laws of the Colonies, and (3) from the documents and events establishing the nation, and Americans' continued free exercise of the right since ratification of the Constitution.

1. English common law recognized the right of subjects to travel abroad unless the Crown imposed restrictions for weighty national security or foreign policy reasons.

The existence and scope of the right to international travel at English common law is one important basis for determining whether and to what extent it is protected by the Constitution. *See Meyer v. Nebraska,* 262 U.S. 390, 399 (1923); *Moore v. United States,* 91 U.S. 270; 274 (1875); *see also Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856).

Common law commentators disagreed about whether the King had the right to restrict subjects from leaving the realm during the law's earliest stages of development. *See Note, Passports And Freedom Of Travel: The Conflict Of A Right And A Privilege* (hereafter "*Note, Passports*"), 41 GEO. L.J. 63, 64-65 (1952). What is not disputed is that in this early period of the 11th and 12th centuries, the King's restrictions were directed against the highest ecclesiastical officials growing out of its disputes with the papacy. (*Id.*, 65.) The beginning of the 13th century saw the first formal recognition of the right of subjects to travel abroad in Chapter 42 of the Magna Carta of 1215 wrung from King John at Runnymede:

> It shall be lawful in the future for anyone (excepting always those imprisoned or outlawed in accordance with the law of the kingdom and natives of any country

> at war with us, and merchants, who shall be treated as is above provided) to leave the kingdom and to return, safe and secure by land and water, except for a short period in time of war, on grounds of public policy — reserving always allegiance due to us. (Trans. in McKechnie, *Magna Carta, A Commentary On The Great Charter Of King John*) (hereafter "McKechnie") 407-08 (2d ed. 1914).

Chapter 41 guaranteed the right to merchants. After the death of King John in 1216, the new Magna Carta preserved the right for merchants but omitted any reference to other subjects. One English commentator explains the omission as arising out of fear of it abuse by the clergy. *See* McKechnie, 408.

The royal exercise of power to restrict travel abroad, having its origins in the Crown's constitutional controversies with the clergy and barons, gradually evolved into a formal restraint known as the writ of *ne exeat regno*. Upon service of the writ, the prospective traveler had to obtain a license from the Crown to depart. *See* Parker, *Right To Go Abroad: To Have And To Hold A Passport* (hereafter "Parker"), 40 VA. L.REV. 853, 867 (1954). In the early 14th century, the Crown "proclaimed" the right to require all subjects to secure permission to travel abroad. *See Note, Passports,* 68. In 1382 after the Peasants War of the preceding year, a statute was enacted confirming the Crown's right to license departures of the lower classes, but exempting barons and merchants. Except for those persons expected to harm the Crown abroad, licenses were issued. *See Goodman, Passports In Perspective* (hereafter "Goodman"), 45 TEX. L.REV. 221, 224 (1966).)

The exercise of royal power to restrict exit apparently fell into disuse in the 15th and 16th centuries. In 1534, a legal

commentator could report that anyone could leave the kingdom, unless restrained by the writ. *See Note, Passports,* 70; Goodman, 225. While the Crown still issued licenses, instances of restrictions concerned foreign policy matters, for example, prohibiting study at Catholic seminaries. *See Note, Passports,* 69. In 1607, under pressure from Parliament, the 1382 statute requiring royal license for foreign travel was repealed. (*Ibid.*) In 1610, common law lawyers argued that the 1216 Magna Carta provision guaranteeing merchants freedom to travel abroad, should apply to all Englishmen. *See* Parker, 866.

Blackstone's *Commentaries*, which are "accepted as the most satisfactory exposition" of the common law since they were familiar to the framers of the Constitution (*Shick v. United States,* 195 U.S. 65, 69 (1904); *Williams v. Fears,* 179 U.S. 270, 274 (1900)), confirms this common law right to travel abroad. Blackstone notes that "personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's inclinations may direct." 1 *Commentaries** 134-37. The common law allowed every man to go abroad ". . . for whatever cause he pleaseth, without obtaining the King's leave" as long as he was not under a royal injunction to stay at home. (*Id.*, *165.) Thus, by the early seventeenth century when English colonists set sail for America, their right to leave and return was both recognized and freely exercised, subject to royal restrictions for reasons of national security or foreign policy.

2. Royal recognition and the colonists' exercise of the right to international travel was crucial in the settlement and growth of the Colonies.

The settlement and growth of the Colonies by the English was accomplished with explicit royal recognition of the right to travel abroad and the colonists' relatively free exercise of that freedom. Formal recognition by the English sovereign and the royal colonial governors both reflected and indeed accelerated the growth and importance of the right to international travel at common law.

Formal royal recognition of the right appeared in the earliest charter for an American colony. Queen Elizabeth's Patent to Sir Humphrey Gilbert in 1578 contained a clause assuring freedom to leave England to anyone who wanted to accompany him. *See Chafee, Three Human Rights In The Constitution of 1787* (hereafter "Chafee") 173 (1956). That clause was inserted in later royal charters, and stands in sharp contrast to the severe restrictions imposed by France and Spain on emigration to their American colonies. (*Id.*, 167-71.) Religious and political loyalty and aristocratic background were basic restrictions on the right to colonize the French and Spanish settlements. England permitted its religious dissenters and lower classes to leave, and never imposed any effective restrictions on travel to the colonies, nor any barriers to entry from other countries. The ease of travel, in large part, explains why the British colonial population grew from about 50,000 in 1650 to 1,850,000 by 1765. *Rossiter, The First American Revolution* (hereafter "Rossiter") 19 (1956).

In America, travel among the Colonies, which functioned as completely autonomous states in relation to each other, flourished without much express legal sanction. *See Chafee,*

177. Indeed, travel among the Colonies and into the western frontier was legally international travel in the colonial period. While the Colonies derived their formal legal charters from the British sovereign, each was legally independent of the other. Moreover, before the Northwest Territory was ceded to England in 1763, travel to trade with the Indians there and to settle was clearly international travel from the Colonies.

Colonial documents also reflected colonists' assertion of right to travel. *See, e.g.*, Massachusetts Body of Liberties of 1641, paragraph 17 quoted at *Note, The Right To Travel And The Loyalty Oath,* 12 COL.J.TRANS.L. 387, 390 (1973). In 1642, colonists forced the royal governor of Maryland to declare:

> . . . the Common right of all inhabitants to depart out of the province at their pleasure unless indebted or obnoxious to justice. (quoted in Goodman, 234.)

Later in the 1660's and 1670's, the Maryland colonial assembly enacted legislation authorizing passes for its residents who wanted to travel to other colonies: the purpose was to facilitate travel by identifying the person to another independent colony rather than to interfere with the freedom. (*Id.*, 235.) When the Dutch in New Amsterdam came under English rule in 1664, one of the rights granted to each resident was the freedom to travel to "England or anyplace." (quoted in Goodman, 236.)

The writ of *ne exeat regno* was used in most colonies, but not as a political device to restrict travel. Instead, it was an equitable proceeding to hold debtors before a court within the borders of a colony (J. Story, *Commentaries On Equity Jurisprudence* 509 (14th ed. 1918)), as it had become in England by the 17th century.

Initially, English mercantile policies dictated that the Colonies be economically subordinate in trading matters: colonies supplied raw materials to England and accepted payment in English manufactured goods. *See* Rossiter, 57-64. As colonial agriculture and manufacturing expanded in the 18th century, this theoretical subordination was replaced by both a belief and practice among the colonists of commercial equality and independence. Restrictive trade laws like the Wollens, Hat and Iron Acts were largely ignored by the colonists. Colonial trade with the French West Indies flagrantly violated the Molasses Act. The English trade restrictions, while generally ignored in practice, provoked colonial resentment. The right to international travel, free of royal restrictions, was an integral part of the settlement of the Colonies, and its restrictions formed one basis for the revolution.

3. An American's right to travel abroad has been an integral strand of the nation's oldest traditions.

The Declaration of Independence, that charter of the American Revolution, was animated by a distinct theory of government having three principal features. (1) All men are created equal and endowed by their creator with certain inalienable rights, including life, liberty and the pursuit of happiness. (2) Governments are instituted to secure these rights, and derive their just powers from the consent of the governed. (3) When a government becomes destructive of those rights, it is the right of the people to alter or abolish it, and to institute a new government based on such principles and powers that seem most likely to ensure their safety and happiness. By 1776, the British government had, according

to the Declaration, violated the rights which the colonists believed were theirs as Englishmen. *See* Rossiter, 7-12, 224-33. Among the specific violations was one that the King "... has endeavored to prevent the population of the States," admittedly with little success.

During the revolution, the Continental Congress tried to limit passes for travel into enemy lines to those issued by the Commander-in-Chief. *See* Goodman, 247. But even then, the purpose was to identify the traveler and not to restrict his travel. As the same time the individual states were issuing their own passports for the same purpose.

The nation's second political charter, the Articles of the Confederation of 1781, contained an express provision in Article IV guaranteeing the right of citizens of one state to travel to and from the others, but no mention was made of the right to travel abroad. The Articles were increasingly condemned for their failure to create an effective national government capable of dealing with matters affecting all states. The constitutional convention was called to remedy those defects. Farrand, *The Framing Of The Constitution Of The United States,* ("Farrand") 42-52 (1913). The debates in the convention of 1787 reveal little relevant on the subject of international travel. No provision was ever offered concerning that right or the right to interstate travel. The absence is attributable to the fact that all citizens could and did travel abroad without government permission or interference. Therefore, the subject was not sufficiently important to engage the delegates' attention. *See* Farrand, 205-06; *Note, Passports,* 71. The same reasons explain the omission in the Bill of Rights ratified seven years later in 1794. Clearly, the long exercise of the right was encompassed within the "liberty" protected by the Fifth Amendment, if the need ever arose. *See* Chafee, 192-93.

During the greater part of our more recent history, the need for a specific guarantee was absent because a citizen's right to travel abroad was generally unrestricted. *See* Passport Office, U.S. Dept. of State, *The United States Passport* (hereafter "*U.S. Passport*") 9 (1976); *Note, Passports,* 72-82; Goodman, 251- 70. Until 1941, restrictions on international travel were imposed during war time by the requirement of obtaining a passport for certain foreign travel. *See Note, Passports,* 72-79. The first general restrictions occurred at the beginning of our involvement in World War II when passports were required for all international travel outside the Western Hemisphere. (*Id.*, 78-79.)

Even a general passport requirement has not curtailed Americans' foreign travel. The number of passports issued has steadily increased over the years; from about 1 million in 1964, to 2.5 million in 1974, to 3.1 million in 1977. *See* Passport Office, *Summary Of Passport Statistics* (hereafter "*Pass. Stats.*") 18 (Jan. 1978). Millions of American citizens travel abroad, and return each year. *See* 1969-1976 *Annual Reports,* Immigration and Nationalization Service (hereafter "INS *Ann. Rep.*") For example, in 1974, the year Grace Aznavorian went to Mexico, more than 8 million other Americans traveled abroad and returned. 1975 INS *Ann. Rep.* 32.

Travelers are of all ages and occupations (*U.S. Passport,* 224-25, Tables 8, 10) and they go abroad for a wide variety of reasons — pleasure, commercial business, personal, religious, education, health and scientific. *See Pass. Stats.*, 12. Indeed, it is not surprising that this nation of immigrants would want to maintain or re-establish ties with family and friends abroad.[8] With the advent of relatively speedy low

[8]This long history of foreign travel free of government restrictions except those dictated by foreign policy and national security is consonant with its recognition in Article 13 of the Universal Declaration of Human *(continued)*

cost commercial transportation, foreign travel has become accessible to everyone. *See, e.g., Time Magazine,* "New Era in the Air, Cheap Fares, Crowded Flights" 50ff. (August 14, 1978).

B. Section 1611(f) Infringes The Basic Constitutional Right To International Travel.

Mrs. Aznavorian was totally dependent on SSI benefits when she made her trip to Mexico for medical treatment. Like millions of other aged, blind and disabled poor, SSI had freed her "from want and the indignities of poverty." *Cardinale v. Mathews*, 399 F. Supp. 1163, 1164 (D.D.C. 1975). It provided her a minimum monthly income, allowed her to retain certain resources, and to save and spend the money as she desired." . . . [P]ayments are made under conditions that are as protective of people's dignity as possible." 20 C.F.R. §416.110(c). She left San Diego on July 24, 1974 intending to return to the country within a month. However, she became ill in Mexico, and could not return to the United States until September 1, 1974. Those few extra days abroad cost her dearly: she forfeited two months of vital SSI benefits by the Secretary's enforcement of §1611(f). The consequences of losing these benefits are obviously so severe that two aged SSI recipients were deterred from returning to their homeland to visit close relatives. Accordingly, the district court found that §1611(f) penalized SSI recipients for traveling abroad so

(footnote continued from preceding page)
Rights, adopted by the General Assembly of the United Nations in 1948. *See* United Nations Dept. of Public Information, S.Doc. 123, 81st. Cong., 1st Sess., 1156. Article 13 provides: "Everyone has the right to leave any country, including his own, and to return to his country."

as to implicate the right in a constitutional evaluation of the statute. (J.S. App. 13A.)

Despite these undeniable consequences, the Secretary claims that §1611(f) has no constitutionally relevant infringement on SSI recipients' right to international travel because: (1) it "does not directly prohibit or regulate" the right (Sec. Bf., 19); and (2) any impact is merely "incidental." (*Id.*, 20.) But neither his test for nor analysis of the impact is correct.

(1) This Court has held that a statute, which only burdens or interferes with the exercise of constitutional rights, infringes those rights, and hence implicates them in a constitutional analysis of the statute. Direct prohibition or regulation is not required.

Durational residency statutes, which deny a "basic necessity of life" such as welfare benefits or nonemergency medical care, have been held to infringe the constitutional right to interstate travel. *Shapiro v. Thompson*, 394 U.S. 618, 628-30 (1969); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 257-58 (1974). The *Shapiro* majority rejected the dissent's test that statutes which "do not create a flat prohibition" on the right to travel do not infringe the right. (394 U.S. at 650.)[9] In *Memorial Hospital*, the Court most clearly articulated the alternative infringement tests for analyzing indirect restrictions on the right to travel: it determines "whether the waiting period would deter migration . . . [or] . . . the extent to which the residence requirement served to *penalize* the exercise of the right." (415 U.S. at 257) (emphasis in original). It required no showing of actual deterrence; probability was

[9]*See Dunn v. Blumstein*, 405 U.S. 330, 341 (1972) ("Travel is permitted but only at a price [by the denial of the right to vote].").

sufficient. *See Shapiro, supra*, 394 U.S. at 650; *Dunn, supra*, 405 U.S. at 340. And it noted that the denial of a "basic necessity of life," like welfare or nonemergency medical care, has greater impact for the infringement test than the denial of "less essential forms of entitlements." (*Id.*, 259.)

The Court has also found the constitutional right to privacy infringed by a restriction less than a total prohibition or direct regulation. The abortion decision was infringed by limitations on the availability of the means to procure an abortion. *Roe v. Wade*, 410 U.S. 113, 153 (1973) (criminal sanctions on doctors and medical personnel on performing abortions); *see also, Singleton v. Wulff*, 428 U.S. 106, 118 n.7, 121, 122 (1976) (*Wade*, not limited to instances in which the state interdicts the abortion decision). The decision to use contraceptives was unduly burdened by a restriction on their sale to licensed pharmacists. *Carey v. Population Services International*, 431 U.S. 678 (1977).

Maher v. Roe, 432 U.S. 464 (1977) does not change the analysis in these cases, as the Secretary implies. (Sec. Bf., 19.) The Court found that the abortion decision was not infringed by the state's failure to pay for nontherapeutic abortions, while paying for pregnancies. It reasoned that before the state began paying pregnancy related expenses, poor and non-poor women had to rely on private sources for abortion services when making the abortion decision. Thus, its later failure to fund abortions did not interfere with the original basis upon which the abortion decision was made. However, the Court emphatically cautioned that the denial of welfare benefits to otherwise eligible women who obtained abortions:

> would . . . [be] . . . a close analogy to the facts in *Shapiro*, and strict scrutiny might be appropriate under

either the penalty analysis or the analysis we have applied in our previous abortion decisions . . . (432 U.S. at 475 n.8.)

(2) Section 1611(f) infringes SSI recipients' right to international travel (a) by deterring them from taking any trip abroad and (b) by penalizing them for taking any trip lasting a calendar month, 30 consecutive days or longer.

(a) The Secretary argues that §1611(f) is "absolutely neutral with respect to international trips lasting less than 30 days . . ." or a calendar month. (Sec. Bf., 19.) He ignores the statute's obvious deterrent effect on recipients' decisions to take even short trips. Mrs. Aznavorian will certainly think twice before taking another short trip. So will other aged, blind and disabled poor, who have justified fears that an unforeseen illness or any other event beyond their control, will prolong their trip and cause them to lose the benefits on which they rely for their subsistence. Thus, §1611(f) deters many recipients from taking even short trips abroad.

The deterrent effect on decisions to take longer trips is even greater and has been shown in the record. The unfulfilled travel plans of Tolstick and Rivas attest to the utter certainty and dire consequences of losing their SSI benefits for traveling even two months. Any denial of need-based benefits will "deprive an eligible recipient of the very means by which to live . . ." *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970). Indeed, the potential effect of any denial of SSI on the aged, blind, and disabled poor, given their greater vulnerability may be more severe than welfare denials on the AFDC recipients in *Shapiro*. In upholding Texas' decision to pay a greater percentage of the needs to aged, blind and disabled poor than to families under the AFDC program, this Court noted that ". . . .it is not

irrational for the State to believe that the young are more adaptable than the sick and elderly, especially because the latter have less hope of improving their situation in the years remaining to them." *Jefferson v. Hackney*, 406 U.S. 535, 549 (1972). In their precarious position, that prospect is indeed so grim, that any loss of benefits makes the price of traveling abroad too high. Like Tolstick and Rivas, many will not go.

(b) The Secretary's analysis of the impact of the benefit denials under §1611(f) is equally incorrect. He assumes that the effect of denying need-based benefits is the same as denying non-need-based benefits. (Sec. Bf., 19.) But since *Goldberg v. Kelly*, this Court has always recognized that the loss of need-based benefits has far more severe consequences on eligible individuals than denials of other government benefits, like Social Security. *See Mathews v. Eldridge*, 424 U.S. 319, 340-42 and n.27 (1976); *Memorial Hospital, supra*, 415 U.S. at 259.

Section 1611(f)'s impact is in certain respects greater than that of the durational residency statutes in *Shapiro* and *Memorial Hospital*. The latter cases involved only applicants for benefits. Section 1611(f) suspends benefits of recipients who have been relying on them for their basic subsistence, often for long periods of time. And it denies them to those least able to scrape together alternative sources of subsistence. *Cf. Jefferson v. Hackney, supra.*

The Secretary suggests that *Califano v. Jobst*, 98 S. Ct. 95 (1977) has carved out an exception to the infringement analysis for "welfare programs." (Sec. Bf., 20.) *Jobst* does not change the law. First, the case did not involve a need-based welfare program, but rather a challenge to statutes terminating Social Security disability benefits received by the child of a deceased wage earner if the child marries a

person ineligible for such benefits. Thus, the Court required a greater impact on the recipient before the termination of benefits could implicate the right to marriage. Second, the Court analyzed the typical marriage situation and concluded that financial independence from parents was a usual consequence:

> . . . Both tradition and common experience support the conclusion that marriage is an event which normally marks an important change in economic status . . . [T]here can be no question about the validity of the assumption that a married person is less likely to be dependent on his parents for support than one who is unmarried. (98 S. Ct. at 99.)

Thus, since termination of parental support does not normally affect the child's marriage decision, the statutory termination of the benefits on the basis of non-dependency on the parent does not burden the right to marry.

In stark contrast, "tradition and common experience" reveal that trips of more than 30 days do not characteristically signify abandonment of the traveler's residence. Both before and after the enactment of the SSI program, millions of Americans traveled abroad and returned. (*See, supra*, 26.) With the increasingly cheaper and more convenient modes of transportation, foreign travel is practically available to anyone. In this day and age, travel does not "normally mark" the abandonment of residency. Indeed, the Secretary "concedes that he maintains no statistics to substantiate that the one month or 30-day travel period is substantially related in fact to abandonment or establishment of residency." (J.S. App. 19A.)

The threatened or actual denial of SSI to aged, blind and disabled recipients under §1611(f) constitutes a direct, substantial interference with their right to international

travel. Many will never travel abroad. Those who make the journey face the formidable, if not frightening, task of securing their shelter here, as well as travel abroad, without the funds on which they depend for their subsistence needs. For people who are disabled from working or are often too old to do so, the loss of that security is undeniably harsh.[10] Against this background, the district court was clearly correct in concluding that §1611(f) infringes SSI recipients' right to international travel so as to implicate it in any analysis of the constitutionality of that provision.

C. Infringements Of The Right To International Travel Are Closely Scrutinized By This Court.

Government infringements of basic constitutional liberties have consistently faced a careful examination of the interests which the government claims to be protecting, the necessity for the means adopted to advance the interests, and the importance of the disadvantaged liberty. *Califano v. Goldfarb*, 430 U.S. 199, 217 (1977) (Stevens, J. concurring) (Social Security survivors' benefits denied to widower not receiving one-half support from his wife upon her death); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (government intrusion on choices concerning family living arrangements); *Roe v. Wade*, 410 U.S. 113 (1973) (criminal abortion laws); *Eisenstadt v. Baird*, 405 U.S.

[10]Indeed, it is a far greater burden than complying with the Wisconsin statute invalidated in *Zablocki v. Redhail*, 98 S. Ct. 673 (Jan. 18, 1978). There the Court found that even those persons who are able to secure court approval to marry, but do not, and those who do, suffer a burden on their right or a limitation on its exercise by having to show financial ability to support their minor children.

438 (1972) (contraceptives only available to married persons); *Reed v. Reed*, 404 U.S. 71 (1971) (discrimination against females in appointment by Probate Court as administrators of estates). This Court has invoked such close scrutiny under both the due process and equal protection guarantees of the Fifth and Fourteenth Amendments and there is no essential difference whether the examination is done under the rubric of Due Process or Equal Protection. *See, e.g., Moore v. City of East Cleveland, supra* (substantive due process under the Fourteenth Amendment); *Califano v. Goldfarb, supra* (equal protection under the Fifth Amendment; *Eisenstadt v. Baird, supra* (equal protection under the Fourteenth Amendment); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (substantive due process under the Fifth Amendment). It is conceded by the Secretary that the Equal Protection Clause of the Fourteenth Amendment finds similar life in the Fifth Amendment due process guarantee. (*See* J.S. App. 20A.)

Likewise, the standard of review in the international travel cases has consistently led to a heightened examination of the challenged restriction. This case marks the fourth attempt by the government to convince this Court that infringements of the right to travel abroad should be measured by no more than a "rational basis" test. Its three prior efforts failed. *Kent v. Dulles*, 357 U.S. 116 (1958); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Zemel v. Rusk*, 381 U.S. 1 (1965). In *Aptheker*, the Court reversed the lower court's opinion which had applied a "reasonable" basis standard. (378 U.S. at 505.)

The Secretary incorrectly claims that none of the Court's prior decisions concerning international travel "indicated that the right . . . is fundamental or 'basic' " and that

"none enunciated a special test for determining when particular foreign travel regulations violated the Due Process Clause." (Sec. Bf., 18.) In *Kent*, the Court clearly and emphatically stated that the right is "basic in our scheme of values." (357 U.S. at 126.) Six years later in *Aptheker*, it quoted the same passage from *Kent* to reiterate the "basic" nature of the right. (378 U.S. at 506.) Again in *Zemel* it cited the same passage to emphasize the constitutional importance of the right. (381 U.S. at 14.) While the trio of international travel cases lacks language wedded to a rigid two-tier formula distinguishing between "strict scrutiny" and a "rational basis" test, there can be no doubt that in each case the Court invoked a heightened scrutiny due to the historical importance of the right to freedom of movement across our frontiers.

Before proceeding to analyze *Kent, Aptheker* and *Zemel* in some detail, the broader aspects of those decisions should be expressed so that they are borne in mind throughout that detailed analysis. Common to all cases was a clear recognition of the special importance of the right to travel abroad, and counterposed against this crucial aspect of personal freedom were the broad and fundamental interests of the federal government in directing the nation's foreign policy and securing the national defense. Yet, it was only in *Zemel*, where the governmental interest loomed so large, and where it was not demonstrated that its interest could be accommodated in a way which trenched more lightly on the freedom, that this Court allowed the balance to be struck in favor of the government. Putting the balancing test in a nutshell, the *Zemel* Court said: "[t]he requirements of due process are a function not only of the extent of the governmental restriction imposed, but also of

the extent of the necessity for the restriction." (381 U.S. at 14.) Here, the awesome nature of the nation's foreign policy, national security and national defense is wholly absent.

In *Kent v. Dulles, supra*, the Court for the first time dealt with the nature and scope of protection afforded the right to travel abroad. The Court characterized the right as "an important aspect of the citizen's 'liberty' " guaranteed by the Due Process Clause (357 U.S. at 127), and emphasized that it "was a part of our heritage" (*Id.*, 126), "emerging at least as early as the Magna Carta." (*Id.*, 125.) The Court recognized that "[t]ravel abroad, like travel within the country . . . is basic in our scheme of values." (*Id.*, 126.) The *Kent* decision relied upon *Crandall v. State of Nevada*, 73 U.S. (6 Wall) 35 (1867), *Williams v. Fears*, 179 U.S. 270 (1900), and *Edwards v. California*, 314 U.S. 160 (1941), all involving travel within the United States. (357 U.S. at 126.) Other decisions of this Court and of lower courts have also cited interstate and international travel cases interchangeably. *See Dunn v. Blumstein*, 405 U.S. 330, 338 (1972) (Douglas J. concurring); *Bell v. Maryland*, 378 U.S. 226, 250 (1964); *United States v. Davis*, 482 F.2d 893, 912 (9th Cir. 1973); *United States v. Cyzewski*, 484 F.2d 509, 511 n.2 (5th Cir. 1973), *cert. denied*, 415 U.S. 902 (1974); *King v. New Rochelle Muni. Housing Auth.*, 442 F.2d 646, 648-49 (2d Cir. 1971); *Baird v. Eisenstadt*, 429 F.2d 1398, 1402 (1st cir. 1970), *aff'd* 405 U.S. 438 (1972); *Wilson v. United States*, 366 F.2d 666, 668 n.2 (D.C. Cir. 1966) (Bazelon, C.J. concurring); *Schactman v. Dulles*, 225 F.2d 938, 944 (D.C. Cir. 1955); *Bauer v. Acheson*, 106 F. Supp. 445, 451 (D.C. 1952).

Kent did not treat the right as a mere abstraction but elaborated upon the multiplicity of highly personal interests which it subsumes. It involves, as the facts of this case poignantly demonstrate, " 'reasons close to the core of personal life — marriage, reuniting families, spending hours with old friends,' " (357 U.S. at 126) or "[i]t may be as close to the heart of the individual as the choice of what he eats, or wears, or reads." (*Ibid.*) It "may be necessary for a livelihood." (*Ibid.*) Foreign travel serves the intellectual interests of our press and academic community as well as enhancing each American's understanding of public issues by direct contact with foreign peoples. (*Id.*, 126-27.) Given this constitutionally protected "liberty," the Court fashioned a rule of strict statutory construction to "construe narrowly all delegated powers that curtail or dilute" the right to foreign travel. (*Id.*, 129.) The rule was applied to invalidate the Secretary's claim of statutory authorization to deny passports to persons because of their alleged Commuist beliefs and associations.

Next, this Court decided *Aptheker v. Secretary of State, supra*, which like this case, concerned the constitutionality of a Congressional enactment restricting foreign travel to some citizens. The government again argued, as it does here, that the right could be curtailed by "reasonable regulation" judged by a simple rational relationship to the governmental purposes advanced. (378 U.S. at 505.) The Court rejected that assertion because it undervalued the right under examination:

> [T]here are well-established principles by which to test whether the restrictions here imposed are consistent with liberty guaranteed in the Fifth Amendment. It is a familiar and basic principle . . . that 'a governmental purpose to control or prevent activities

constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'

* * *

'[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.'
(*Id.*, 508) (citations ommitted).

While in *Aptheker* the legitimate purpose for limiting travel was to "protect our national security" (*id.*, 509), the Court nevertheless found that less intrusive means were available for achieving the purpose. (*Id.*, 512-13.) It further ruled that the limitation was not "narrowly drawn to prevent the supposed evil" and that "precision must be the touchstone of legislation so affecting basic freedoms." (*Id.*, 514.) The Court found that the limitation on travel was supported "only by a tenuous relationship" between the means adopted and Congressional objective sought in the challenged statute. (*Ibid.*) The Secretary's effort to obfuscate the principles that emerge from the *Aptheker* decision cannot withstand the clarity of that holding, especially since the dissenting opinion in that case adopted the "reasonable" standard test urged then and now by the government. (*Id.*, 525-26.)

Zemel v. Rusk, supra, is the most recent international travel case to be decided by this Court on constitutional grounds. *Zemel* similarly mandates constitutional standards far more stringent than the "rational basis" test urged by the Secretary. Shortly before the Cuban missile crisis,

the Secretary of State restricted travel to Cuba. The Court devoted much of its analysis to an examination of the "extent of the necessity for the restriction" on travel. (381 U.S. at 14-17.) It concluded that because of the "weightiest considerations of national security" (*Id*, 16) and the risk that travel to Cuba "might involve the Nation in dangerous international incidents . . ." (*Id.*, 15), the right of the individual must succumb to the Nation's needs. This Court clearly required and found a government interest having more than just some "rational basis."

The standards developed in *Kent* and *Aptheker*, and applied in *Zemel*, have precedential value which cannot now be ignored. Together, these cases require that restrictions on international travel be supported by the "weightiest" governmental interests (*Zemel, supra*, 381 U.S. at 16), and cannot be achieved "by means which sweep unnecessarily broadly" when others are available. *Aptheker, supra*, 378 U.S. at 508.

In *United States v. Laub*, 385 U.S. 475 (1967), this Court again refused to give a broad construction to the Immigration and Nationality Act (8 U.S.C. §1185(b)) as urged by the government to impose criminal penalties for travel to Cuba without a passport. Consistent with the principle of strict construction of statutes affecting international travel laid down in *Kent*, the Court required an explicit Congressional approval for such sanctions and found none.[11]

[11]That rule of strict statutory construction of limitations on foreign travel was followed by the Court of Appeals in *Lynd v. Rusk*, 389 F.2d 940, 945 (D.C. Cir. 1967) to invalidate administrative sanctions of passport revocation and non-renewal, until it was assured than an individual would not travel in the future in violation of an area restriction. More recently, a lower court has invalidated the loyalty oath requirement for passport applicants on both statutory and constitutional grounds. *Woodward v. Rogers*, 344 F. Supp. 974 (D. D.C. 1972), *aff'd* 486 F.2d 1317 (D.C. Cir. 1973).

This unbroken series of decisions[12] has accorded the right to international travel protection under the Fifth Amendment that can only be restricted for clearly validated reasons of foreign policy and national security. More than 750 years of Anglo-American history reveal the same narrow restriction. The district court correctly relied on these cases in finding §1611(f) invalid under the Due Process Clause of the Fifth Amendment. (J.S. App. 16A n.8.)

D. Section 1611(f) Sweeps Too Broadly On The Right To Travel Abroad Without Substantially Achieving Its Purposes.

1. The residency justification of §1611(f) is insufficient to support its constitutionality.

a. Prior establishment of United States residency.

The Secretary's primary argument in support of §1611(f) is that it provides "one means of implementing the [SSI] residence requirement." (Sec. Bf., 21-24.)

[12]The Court's recent decision in *Califano v. Gautier Torres*, 98 S. Ct. 906 (Feb. 27, 1978) is not an international travel case. There an SSI recipient living in Connecticut moved to Puerto Rico to take up permanent residence. The Court ruled that such travel was interstate travel. It held the termination of his SSI for moving to Puerto Rico did not infringe the right, since he was treated no differently from all other residents who were ineligible for SSI. In this case, the right to international travel is involved because it concerns SSI recipients who do not intend to abandon their residence when they travel abroad and return.

Section 1614(a)(1)(B) (42 U.S.C. §1382c(a)(1)(B)) requires that each SSI recipient be a "resident of the United States." Limiting SSI to bona fide United States residents is a legitimate government purpose, as we conceded and the district court agreed. (J.S. App. 16A.) *See also Califano v. Gautier Torres*, 98 S. Ct. 960 (Feb. 27, 1978).

In making the residence determination, the Secretary has a wide variety of data at his disposal. His Claims Manual ("CM") §A2101(a) provides:

> For purposes of Title XVI, a person becomes a resident when he establishes a *factual place of abode* and lives in a particular locality in one of the 50 states or the District of Columbia *with the intent to remain there.* Where his arrival is of recent date and he has not established a permanent home, the intent may be inferred from such actions as arranging for a rental or purchase of a dwelling, obtaining or seeking employment, joining a church or the like. (emphasis added).

A number of questions on the application form are directed to eliciting these objective factors of the applicant's subjective "intent." These include inquiries into how long the applicant has made his home in the United States (CM §12117(e)); whether the applicant has been outside the United States in the previous 30 days (*Id.*, §12117(f)); where and with whom the applicant resides (*id.*, §12122); whether the applicant owns, is buying or rents his home (*id.*, §12122(c)); and the applicant's mailing address and where he "may be contacted during the day by telephone." Form SSA-8001, at 4. There are further guidelines for "developing the fact of U. S. residence" in other situations. *See* CM §A2101.5(a).[13]

[13]These provisions state that "[w]here there is nothing in [the] file to indicate that an individual is outside the United States, no question need be raised concerning residence." (CM § A2101.6(a)), unless one of the

(continued)

Everyone concedes that Aznavorian, Tolstick and Rivas were bona fide residents of the United States at the time they made their decisions to travel abroad. Thus, in compliance with the Secretary's rules and regulations, they had demonstrated that they had permanent homes in the United States and that they intended to remain here indefinitely.

b. Abandonment of United States residence.

The first sentence of §1611(f) states in relevant part:

...no individual shall be considered an eligible indivi-

(footnote continued from preceding page)
following situations exists: (1) the address is "a post office box or general delivery in city or town bordering on Canada or Mexico" or (2) is "in the care of another person." (*Id.*, § A2101.5(a)(1), (2).)

(1) Where the address appears to be a mail drop in a town bordering Canada or Mexico, the SSI worker is instructed to "obtain an explanation," and if satisfactorily provided, "no further development is needed." (*Id.*, § A2101.5(b).) If the SSI applicant is not readily available to provide such an explanation, the SSI worker is instructed to "consult the telephone or city directory" (*ibid*) to determine whether the applicant is listed in the city or town. If so, and in the absence of anything else in the file which raises a question concerning the applicant's residence, the SSI worker is instructed to "obtain the statements of two reliable persons who can state with knowledge where the claimant lives." (*Ibid.*) Finally, the Claims Manual provides certain "Development Guides" to assist in establishing a claimant's residence. (*Id.*, § A2101.5(d).)

(2) Where the applicant provides an address in care of another person, he is to be contacted and questioned regarding his residence. (§ A2101.5(c)) If no questions are raised in the interview, "no further development is needed." (Ibid.) If questions concerning residency remain after the interview, the SSI worker is instructed to "obtain the statements of two reliable persons who can state with knowledge where the claimant lives." (*Ibid.*) Finally, the Claims Manual provides certain "Development Guides" to assist in establishing a claimant's residence. (*Id.*, § A2101.5(d).)

dual [for SSI]...for a month during all of which such individual is outside the United States...

The district court ruled, and the Secretary does not dispute, that the effect of this provision is "to create a conclusive presumption of abandonment of United States residency upon any departure exceeding one calendar month." (J.S. App. 11A.)

i. Factual inaccuracy of the abandonment of residency presumption.

Factual support for the relationship between a recipient's month long trip and his abandonment of United States residence is wholly lacking. There is no meaningful legislative history. The Secretary's only two citations are to passages in the House and Senate reports that simply redescribe the operative terms and effect of the presumption. *See* H.R. Rep. No. 231, 92d Cong., 1st Sess. 149 (1971); S. Rep. No. 1230, 92d Cong., 2d Sess. 385 (1972). Moreover the legislative history reveals that Congress did not give any specific attention to the facts underlying the abandonment presumption. *See Califano v. Goldfarb*, 430 U.S. 199, 215 (1977). Nor was the presumption "evolved in response to problems experienced in the administration of" welfare programs replaced by SSI. *See Cleland v. National College of Business*, 98 S. Ct. 1024, 1026 (Mar. 20, 1978) (upholding a classificatory provision based on extensive Congressional experience with specific abuses and their solutions over two decades). The presumption found in §1611(f) also lacks the kind of history of Congressional study and concern that led the Court to

uphold the dependency presumptions in *Weinberger v. Salfi*, 422 U.S. 749, 777-80 (1975) and *Mathews v. De Castro*, 429 U.S. 181, 187 (1976).

What experience does the Secretary have in administering the SSI program to support the abandonment presumption in §1611(f)? Responding to a specific interrogatory on that question, he admitted that:

> ...[N]o statistics [are maintained] to substantiate ... [the] ...assertion that the one month or 30-day travel period is substantially related in fact to abandonment or establishment of residency. (J.S. App. 19A.)

Thus, the relationship between the known fact of a month trip and the presumed fact of abandonment of residency is without evidentiary foundation. *Cf. Jimenez v. Weinberger*, 417 U.S. 628, 633 (1974); *Memorial Hospital v. Maricopa Co.*, 415 U.S. 250, 267 (1974); *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969); *Craig v. Boren*, 429 U.S. 190, 200-04 (1976).

Absent any legislative history, the Secretary postulates several factual assumptions to support the abandonment presumption. "Because international travel is costly" (Sec. Bf., 24-25), and "SSI recipients are not wealthy," they are "unlikely to take lengthy tours abroad..." (*Id.*, 23.) Thus, the SSI recipient traveling abroad for more than a month is "taking up residence outside the United States." (*Id.*, 25.) These speculations are insufficient because they are not based on "tradition and common experience" (*Califano v. Jobst*, 98 S. Ct. 95, 99 (1977)) or on "reasonable empirical judgments." *Mathews v. Lucas*, 427 U.S. 495, 510 (1976).

The Secretary portrays foreign travel as a luxury "tour" for the wealthy and beyond the financial means of SSI recipients. Whatever the truth of that picture in some by-

gone era (*Stanton v. Stanton*, 421 U.S. 7, 14 (1975)), it does not fit travel abroad in this age of cheap commercial transportation. Foreign travel is often as inexpensive as interstate travel: trips to Canada or to Mexico, such as Mrs. Aznavorian's, cost less than many trips within the country. Indeed, when more than 8 million citizens of this country traveled abroad and returned the same year as Mrs. Aznavorian, it is fair to observe that foreign travel has become commonplace. *See* 1975 INS *Ann. Rep.* 32.

Foreign travel is not just a "tour." (Sec. Bf., 23.) This Court recognized more than two decades ago that people travel abroad for " 'reasons close to the core of personal life —marriage, reuniting families, spending hours with old friends,' " "a livelihood," scholarship and information. *Kent v. Dulles*, 357 U.S. 116, 126-27 (1958). That recognition is equally true today. The facts here reveal the intensely personal reasons why the aged and disabled typically travel abroad. Mrs. Aznavorian went to Mexico for health reasons. Rivas and Tolstick wanted in their old age to briefly see their homelands and families one more time. Surely, in this land of immigrants, it is not surprising that its residents want to reaffirm family ties abroad.

SSI recipients are, of course, "not wealthy," but cheap, accessible transportation brings foreign travel within their means. Through savings, they can acquire up to $1,500 without losing SSI benefits, a sum enabling them to make a trip abroad for considerably more than one month. Moreover, there is no limitation on how recipients may spend their funds, as the Secretary's regulations make clear: "...[n]o restrictions, implied or otherwise, are placed on how recipients spend federal payments." 20 C.F.R. §416.110(c).

When millions of Americans travel abroad and return each year, there is no basis for assuming that recipients are abandoning their residence from the mere fact of their short, one month absence from the United States. Considering the indiscriminately wide sweep of §1611(f)'s presumption, the Secretary correctly concedes that it is "arbitrary." (Sec. Bf., 24.) But it is clearly arbitrary far more frequently than "on occasion" as he suggests. Given the financial means and the reasons why recipients typically travel abroad, the Secretary has not demonstrated the substantial rationality of the abandonment of residency presumption by any "tradition," "common experience" or "reasoned empirical judgments."

ii. Administrative convenience.

Despite the lack of substantial rationality in the abandonment presumption, the Secretary tries to justify it as administratively convenient in avoiding the costs and errors of individual abandonment determinations and in preventing fraud. (Sec. Bf., 22-23.) Every short cut saves funds, but "bright lines" do not blind the Court from assessing what is gained and lost in the administration of a whole program by the operation of such a presumption.

The assumption underlying the presumption in §1611(f) is so tenuous and unsupported by any evidence, experience or common sense, that there can be little doubt that it denies SSI benefits to far more eligible recipients than to non-residents. Section 1611(f) constitutes a broad, blanket presumption that precludes any alternative method for proving retention of United States residence. The Court has

struck down just such legislative classifications because they allowed no "... middle ground between the extremes of complete exclusion and case-by-case determination..." *Trimble v. Gordon*, 430 U.S. 762, 771 (1977). *See Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975). By contrast it has upheld classifications which were "carefully tuned to alternative considerations" and allowed many persons to rebut the presumption. *Mathews v. Lucas*, 427 U.S. 495, 513 (1976); *Weinberger v. Salfi*, 422 U.S. 749, 770-72 (1975). The key to these decisions is that classifications must be narrowly drawn so that they do not broadly deny persons the opportunity to establish their eligibility for benefits if there are alternatives to a broad conclusive presumption.[14] This is substantially the test used by the Court in *Kent, Aptheker* and *Zemel* when it examined the "necessity for the government's restriction" on international travel.

As the district court recognized, the Secretary has a fully panolpy of alternatives currently available to avoid the broad exclusions of eligible recipients traveling abroad occurring under § 1611(f). These methods accomplish the objective of limiting SSI to bona fide United States residents. (J.S. App. 18A-19A.) Secretary has a broad duty to monitor the continuing eligiblity of recipients. Section 1631(e)(1)(A), 42 U.S.C. §1383(e)(1)(A). His regulations require at least annual redeterminations of eligibility. 20 C.F.R. §416.222. To assist in this task, he has imposed

[14]The Secretary's reliance on *Mathews v. Diaz*, 426 U.S. 67 (1976) is inappropriate. The Court specifically observed that Congressional classifications involving aliens are typically allowed broader latitude than would be permitted for those affecting citizens based on its constitutionally recognized plenary power over naturalization and immigration. *See also Fiallo v. Bell*, 430 U.S. 787, 792 (1977).

certain responsibilities on recipients. They have a continuing duty to report changed circumstances that may affect any eligibility factor, including residency. 20 C.F.R. §§416.220, 416.703. This duty "applies throughout subsequent periods" after eligibility is initially established. CM §12109(a). They must report any plans to travel abroad (*id.*, 416.703(j)), including the "length of time he expects to be away." CM §11313. The Secretary has developed guidelines for evaluating when a recipient abandons his United States residence. Claims Manual §A2101(b) provides:

> Residence ceases to exist when the individual leaves the United States with the intent to establish permanent residence outside the United States or abandons his U. S. abode. Lack of U. S. mailing address could constitute a change of residence which is other than temporary or transitory in nature, unless strong evidence can be produced which would substantiate U. S. residency. Consider such factors as whether a dwelling such as a house or apartment in the United States has been retained, and if not, under what conditions it was abandoned; how long the individual has been absent from the United States, how long the absence is likely to continue . . .

The Secretary relies on the existence of a recipient's home (CM §A1201(a)) or dwelling (*id.*, §A2101(b)) as the primary residency factor. Together, the Secretary can evaluate the travel plans of recipients in light of objective factors, including their financial resources available during their trip, to determine whether they are abandoning their residence. *Cf. Memorial Hospital, supra*, 415 U.S. at 267-68; *Shapiro, supra*, 394 U.S. at 636. While the purpose of §1611(f) may be legitimate, that purpose cannot be pursued by means that broadly stifle the right to travel

"when the end can be more narrowly achieved." *Aptheker, supra*, 378 U.S. at 508. Given the more focused means of identifying travelers who abandon their residence, the broad classification creates far many more mistaken denials of benefits than would individual determinations based on the foregoing factors.

iii. Fraud prevention.

The Secretary argues that §1611(f) "lessens the possibility of fraud" (Sec. Bf. 13, 26) in residency claims by requiring "actual physical presence" within a reasonable proximity of a SSA office, thus enabling administrators to ensure that SSI benefits reach their intended recipients. (Sec. Bf. 26.) In fact, §1611(f) does not accomplish this objective. As noted above, the SSI applicant's assertions are largely relied upon when the Secretary resolves the initial residency question and subsequent redeterminations. The Claims Manual instructs the SSA worker to "take no further action"' when an SSI applicant asserts that he has not been outside of the United States for the past 30 days. CM §12117(f). Likewise, no mechanism exists for the SSA worker to methodically ascertain whether a recipient has left the United States for more than one calendar month or 30 consecutive days. The manual section concerning suspension of benefits to recipients who are traveling, simply notes that "[w]hen a recipient reports a future absence from the United States, ascertain the length of time he expects to be away..." CM §11313. The Secretary suggests that some portion of SSI recipients will not be honest about reporting their abandonment of United States

residency, thereby requiring an "administratively simple demarcation line." (Sec. Bf., 22.) But if a recipient would not be honest about his true residency in the first instance, why would he be honest about reporting the criteria required to assess whether he falls within the "demarcation line?" In *Memorial Hospital* this Court responded to a similar claim that an easily administrable conclusive presumption of non-residency requirement prevented fraud, by noting that the dishonest applicant could just as easily swear to having fulfilled the requirement as not. (415 U.S. at 268.) As noted by the district court:

> [A] recipient/applicant could just as easily be dishonest in providing information required to apply this objective test. The fraud prevention aspect of §1611(f) can further be defeated by the recipient simply entering the United States for one day during the calendar month or thirty consecutive day period that would otherwise trigger a suspension of benefits. (J.S. App. 18A.)

Given the ease with which §1611(f) can be circumvented, it may in fact increase rather than decrease fraud in the SSI program.

Other sections[15] within the Social Security Act have been established for the specific purpose of preventing fraud and circumvention of eligibility criteria. The Act provides for specific penalties in the event a recipient fails "to submit a report of events and changes in circumstances relevant to

[15] *See, e.g.*, Section 1631(e)(1)(B), 42 U.S.C. § 1383(e)(1)(B) (requiring verification of information received from an applicant/recipient); Section 1611(e)(3), 42 U.S.C. § 1382(e)(3) (requiring the monitoring of all recipients); Section 1631(b), 42 U.S.C. § 1383(b) (requiring repayment to the programs of overpayments received by recipients).

eligibility . . . or delays[s] . . . in submitting a report" as required by the Secretary. Section 1631(e)(2), 42 U.S.C. §1383(e)(2). No law suggests that a recipient's obligation to cooperate with SSA on eligibility matters, including residency matters, evaporates while he is traveling. The Act also provides for criminal penalties in circumstances involving fraudulent acts to obtain benefits. In addition to available criminal penalties, the Act provides for a "proper adjustment or recovery" to be made by "appropriate adjustments in future payments" when a fraudulent overpayment is discovered. Section 1631(b), 42 U.S.C. §1383(b).

The inconsequential relationship between §1611(f) and the prevention of fraud cannot withstand constitutional scrutiny under the Fifth Amendment's Due Process Clause. The statute is obviously not narrowly drawn and there is no evidence that its alleged fraud prevention aspects would be "significantly impaired" if §1611(f) were to be found unconstitutional. *Jimenez v. Weinberger, supra*, 417 U.S. at 633. In fact, under such circumstances the Secretary will simply continue to enforce the particular fraud prevention devices already in place in the SSI program.

c. Reacquisition of United States residence.

The second sentence of §1611(f) states in relevant part:

> ...For purpose of the preceding sentence, after an individual has been outside the United States for any period of 30 consecutive days, he shall be treated as remaining *outside* the United States until he has been *in* the United States for a period of 30 consecutive days. (emphasis added).

This provision precludes recipients who have returned from showing that they are United States residents. The Secretary only asserts that this provision "insures that SSI recipients are United States residents" (Sec. Bf. 23) and "avoids unequal treatment" by denying benefits to those whose month trips do not coincide with a calendar month, and hence are not denied under the first sentence in §1611(f). (*Id.*, 24.)

i. Factual inaccuracy of residency and penalty purposes.

Again, like the abandonment provision, the factual assumptions behind the residency purpose have no legislative history, or evidentiary record to support them. (*See, supra*, 43-44.) In light of "common experience" and "reasonable empirical judgments," these assumptions are even more illusory than those postulated for the abandonment presumption of the first sentence. The first crucial fact which undercuts any abandonment justification for this waiting period is that it applies only to individuals who have returned to the United States. Second, all these returned SSI recipients have already established once to the satisfaction of the Secretary that they are bona fide residents of the United States. Third, to the extent this provision presumes abandonment from a month trip it is as tenuous as the first sentence. (*See, supra*, 43-46.)

The Secretary argues that the second sentence of §1611(f) "avoids unequal treatment" of persons who travel abroad for more than 30 days but are not out of the country for one full calendar month. (Sec. Bf., 24.) The 30-

day rule assertedly equalizes the penalty on the calendar month traveler by also taking benefits away from the 30-day traveler for the first 30 days following his return home. However, the statute subverts its purported goal. Except during February, a person traveling abroad for any other full calendar month, will have a double penalty: he loses one month's benefits under the first sentence, and one more under the second. Indeed, it creates the very kind of "unequal treatment" the Secretary asserts it was designed to avoid.

ii. Administrative convenience.

The Secretary asserts the 30-day rule is administratively convenient in preventing fraudulent residency claims. (Sec. Bf., 24.) The "easily administrable method of restricting benefits to United States residents" that the Secretary seeks (*id.*, 23), is already in existence and is followed in determining a claimant's initial and continuing eligibility under §1614(a)(1)(B). The "method" consists of rational objective criteria utilized to determine residency when persons first apply for SSI. (*See, supra*, 41-43.) Indeed, as the Secretary stated in the district court:

> When someone is in the United States and attempting to establish residence . . . it is a relatively simple matter to check the claims of the establishment of residency should need arise. . .
>
> (R. 286.)

Moreover, since the Secretary has a duty to ensure compliance with all eligibility requirements at the end of the

30-day waiting period, the waiting period constitutes a separate and independent residence test imposed solely for foreign travel. As such, it is invalid even under a rational basis test. *Shapiro, supra*, 394 U.S. at 638. Thus, the only effect of this 30-day period is to delay the receipt of benefits. Managing to survive for a month without benefits undoubtedly tests an aged, blind or disabled recipient's endurance and resourcefulness, but it is obviously an arbitrary and irrational way to determine his intent to live here.

iii. Fraud prevention.

The Secretary's fraud prevention argument is even more illusory when applied to returned recipients during the 30-day waiting period, than to those who are traveling abroad. (Sec. Bf., 26.) As noted, the reacquisition test in the second sentence of §1611(f) accomplishes nothing more than a 30 day delay in the Secretary's determination of the recipient's residency. It does not obviate the Secretary's general duty to ensure compliance by a recipient with the United States residency requirement in §1614(a)(1)(B).

The Secretary argues that the abandonment presumption in the first sentence assists in the prevention of fraud by requiring "actual physical presence" in close proximity to a SSA office. That rationale obviously has no application when a recipient has returned to the United States, where he will always be near some office. As the Secretary has conceded, ". . . it is a relatively simple matter to check the [residence] claims" of such people. (R. 286.) Returned

recipients are in precisely the same situation as all other SSI claimants: there is no special need to impose a 30-day waiting period to prevent fraud when the Secretary does not do so for any other person in the United States. To the extent that a recipient is dishonest, the 30-day rule can be easily circumvented by the failure to report a trip of 30 consecutive days. In a word, the second sentence adds nothing and accomplishes nothing to prevent fraud.

2. The "windfall" and "lack of need" justifications for §1611(f) are insufficient to support the constitutionality of the statute.

The Secretary argues that §1611(f) has two other related objectives: preventing SSI recipients from obtaining "windfall" benefits while traveling abroad, and reinforcing SSI "need requirements[s]." (Sec. Bf., 24-25.) But the Court has often noted in due process cases that assertions of legislative purposes need not be accepted at face value, when other factors demonstrate the asserted purposes could not have been a goal of the legislation. *E.g.*, *Moore v. City of East Cleveland*, 431 U.S. 494, 500 n.7 (1977); *Califano v. Goldfarb*, 430 U.S. 199, 213 (1977); *Weinberger v. Weisenfeld*, 420 U.S. 636, 648 (1975); *Jimenez v. Weinberger*, 417 U.S. 628, 634 (1974); *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 536-38 (1973). This principle applies here.

Assertions of legislative purpose raised for the first time late in the litigation are unlikely to be real purposes. *Cf. Turner v. Department of Employment Security*, 423 U.S. 44, 45 n.* (1975). In contrast to the residency claim which

the Secretary has maintained throughout this case, his purported "windfall" and "need" objectives are afterthoughts. They appeared first in his Supplemental Memorandum supporting reconsideration in the district court. (R. 390-403.) Even then, their contents differed from the present formulations. Words of legislative history are not so easily changed.

In fact, the Secretary cannot cite any legislative history of §1611(f) supporting either assertion of Congressional intent. *See Califano v. Goldfarb, supra*, 430 U.S. at 214. What scant history does exist, indicates that the statute was mentioned only in its relation to a recipient's "residence abroad for a full calendar month." *See* S. Rep. 1230, 92d Cong., 2d Sess. 385 (1972); H.R. Rep. 231, 92d Cong., 1st Sess. 199 (1971). Indeed, the Secretary's "windfall" argument appears to be little more than the "selecting [of] a convenient, but false, *post-hoc* rationalization." *Craig v. Boren*, 429 U.S. 190, 200 n.7 (1976).

In determining real statutory objectives, the Court has also relied on the language of the challenged provision and determined whether another provision covered the asserted purpose. *E.g., Moore v. City of East Cleveland, supra*, 431 U.S. at 516, n.7; *Califano v. Goldfarb, supra*, 430 U.S. at 213; *U.S. Dept. of Agriculture v. Moreno, supra*, 413 U.S. at 536-37. Here, §1611(f) contains no language referring to recipients' "needs" or "windfall benefits;" it speaks only of physical presence in, and absence from, the United States. Moreover, other SSI statutes and regulations foster these specific purposes by providing complete networks aimed against fraud and designed to determine, prevent and recoup overpayments. Sections 1611(e)(3); 1631(b), (e)(1)(B); 1632 (42 U.S.C. §§1382(e)(3), 1383(b),

(e)(1)(B), 1383(a); 20 C.F.R. §§416.538, 416.558(a). (*See* J.S. App. 18A.) The overpayment provisions require the Secretary to prove that an overpayment occurred in fact before he may reduce, suspend or deny benefits. *See also Cardinale v. Mathews*, 399 F. Supp. 1163, 1175 (D.D.C. 1975) (due process also mandates factual hearing prior to SSI recoupment). Yet the Secretary's effective assumption of overpayment and consequent denial of a fair factual hearing applies only to those who exercise their basic right to international travel.

Courts uniformly invalidate statutes and reject government arguments which seek to deny public entitlements on the basis of assumed income which might not be received in fact. *See, e.g., U.S. Dept. of Agriculture v. Moreno, supra*, 413 U.S. at 535-37 (1973) (assuming "unrelated" households receive income exceeding Food Stamp eligibility); *U.S. Dept. of Agriculture v. Murry*, 413 U.S. 508 (1973) (assuming households with certain "tax dependents" receive income exceeding Food Stamp eligibility); *Hurley v. Van Lare*, 380 F. Supp. 167, 174-78 (S. & E.D. N.Y. 1974), *aff'd on other grounds*, 421 U.S. 338 (1975) (assuming "lodger" contributes to housing expense, therefore decreasing public assistance grant).

From another viewpoint it is far from clear that Congress intended to preclude what the Secretary calls "windfall benefits." when SSI recipients travel inside the United States, hospitality received while visiting family or friends is not considered "in kind" income which reduces SSI payments because they are not "living" there. Section 1612, 42 U.S.C. § 1382a; 20 C.F.R. § 416.1125(a), (b). Moreover, the Secretary expressly allows recipients to spend their entitlements when and where they choose. 20

C.F.R. §416.110(c). Thus, temporarily taking advantage of lower prices abroad is economically no different from living in a cheaper part of the United States, visiting with family and friends, or taking advantage of lower prices whenever possible.

Even if these assertions were actual purposes of §1611(f), the statute fails to bear a sufficient relationship to them. The "windfall" and "lack of need" presumptions are based on only one new factual assumption: living costs are lower in some foreign countries than in the United States. But basing the "windfall" or "lack of need" on this assumption produces grossly inaccurate results for several reasons. First, it ignores that SSI recipients may travel to countries with costs of living higher than the United States. Second, it ignores the fact that recipients — like other travelers — have fixed costs in the United States, like rent and utilities, during their trips. Third, it ignores the recipient's actual transportation costs. Fourth, it fails to consider that travelers cannot take advantage of the normal cost of living available to residents of foreign countries because temporary meals and accommodations cost more than eating and living at home. Finally, the "windfall" and "lack of need" arguments have absolutely no applicability to the 30-day reacquisition of residency period.

For these reasons, the "windfall" and "lack of need" claims cannot be the real purposes of §1611(f). If they were, they do not sufficiently accomplish their objectives to preserve the constitutionality of the statute.

None of the justifications advanced by the Secretary here is sufficient to uphold the constitutionality of §1611(f) under the principles laid down in *Kent*, *Aptheker*, *Zemel* and the other heightened scrutiny cases. Section 1611(f)

uses a sweepingly broad presumption of doubtful and insubstantial factual validity in a setting where clear alternatives exist to avoid unduly interfering with the right of aged, blind and disabled SSI recipients to travel abroad. The district court was clearly correct in ruling it unconstitutional under the Due Process Clause of the Fifth Amendment.

II.

SOVEREIGN IMMUNITY DOES NOT BAR RECOVERY OF UNCONSTITUTIONALLY DENIED SSI BENEFITS.

Because the district court held §1611(f) unconstitutional, it granted the statutorily authorized relief to Grace Aznavorian and her appellee class members. It reversed the Secretary's denial of SSI to Aznavorian during August and September, 1974, and directed him to pay her those amounts since he never contended that she in fact abandoned her United States residence during those months. (J.S. App. 32A-33A.) It also reversed the Secretary's §1611(f) denials of SSI to appellee class members. It did not direct him to pay them benefits automatically, but remanded their claims for an opportunity to show at administrative proceedings that they did not in fact abandon their United States residences during their trips abroad. (*Id.*, 32A.) That relief gives the Secretary a second chance to show his initial denials satisfied constitutional standards.

The Secretary does not assert ignorance of the content of a constitutionally permissible residency standard by which

to conduct remand proceedings. Instead he claims that sovereign immunity bars this relief. (Sec. Bf., 28-31.) In effect, he argues that the doctrine permits him to run roughshod over the constitutional rights of our poorest citizens with financial impunity by precluding their recovery of vitally necessary SSI benefits unconstitutionally denied them. He cannot be successful on this point because to do so he would have to erase decades of judicial decisions awarding illegaly denied Social Security benefits. *See, e.g., Ayers v. Hobby*, 123 F. Supp. 115, 118 (D. Va. 1954).

The Secretary does not, indeed cannot, cite any social security decision holding that sovereign immunity precludes federal courts from granting recipients and applicants an opportunity to recover benefits denied solely pursuant to an unconstitutional statute. Numerous decisions approve such relief. *E.g., Califano v. Goldfarb*, 430 U.S. 199 (1977), *aff'g Goldfarb v. Secretary of Health, Education and Welfare*, 396 F. Supp. 308, 309 (E.D. N.Y. 1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), *aff'g* 367 F. Supp. 981 (D. N.J. 1973); *Jimenez v. Weinberger*, 417 U.S. 628, 637-38 (1974); *Richardson v. Griffin*, 409 U.S. 1069 (1972), *aff'g* 346 F. Supp. 1226, 1237 (D. Md. 1972); *Jimenez v. Weinberger*, 523 F.2d 689, 704 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); *Oliver v. Califano*, CCH Unemployment Ins. Rep. ("CCH UIR") ¶15,244 (C.D. Cal. 1977.)

Section 1631 of the Act (42 U.S.C. §1383) sets out the conditions for an individual to obtain review of the Secretary's adverse decisions concerning his eligibility for SSI. No statutory distinction is drawn between decisions which are adverse because of constitutional defects and

those based on statutory misapplication. Instead, subsection 1631(c)(1) requires the Secretary to provide a hearing to:

> any individual who . . . claims to be . . . eligible [for SSI from the time of denial] and is in disagreement with any determination . . . with respect to eligibility . . . for benefits . . .

Subsection 1631(c)(3) then provides that the Secretary's determination under subsection 1631(c)(1):

> ...shall be subject to judicial review as provided in section 405(g) of this title to the same extent as the Secretary's final determination under section 405 of this title [section 205 of the Act].

Section 205 sets out the district court's review jurisdiction and describes some types of judgments it may issue in a suit, like this one, to "*recover* on a claim under the Act." Section 205(h), 42 U.S.C. §405(h) (emphasis added). Pursuant to §205(g), the district court:

> ...shall have power to enter, upon the pleadings and transcript of the record a judgment, affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing.

Section 205, like Section 1631, draws no distinction between "constitutional" and "statutory" claims. Indeed, this Court has repeatedly interpreted §205 as authorizing actions such as this one "to recover on any claim [because] of allegedly unconstitutional statutory restrictions." *Weinberger v. Salfi*, 422 U.S. 749, 762 (1975); *Flemming v. Nestor*, 363 U.S. 603, 607 (1960). Consequently, other courts have interpreted §205 as a limited waiver of sovereign immunity, permitting them to "reverse" the Secretary's decisions and to direct claimants "to recover"

improperly denied payments "with or without remanding" for rehearing. *E.g., Jimenez v. Weinberger, supra*, 523 F.2d at 702, 704 n.33; *Gaither v. Gardner*, 295 F. Supp. 458, 459 (D. Md. 1969); *Cohn v. Federal Security Administration*, 199 F. Supp. 884, 885 (W.D. N.Y. 1961.)

The statutory scheme authorizing the relief granted in this case becomes complete only after consideration of §1631(b):

> Whenever the Secretary finds that . . . less than the correct amount of benefits has been paid with respect to an individual, proper . . . recovery shall . . . be made by appropriate adjustments in future payments to such individual . . . (emphasis added).[16]

The district court correctly noted that §1631(b) authorizes recovery of underpayments for "any mistaken denial," constitutional or otherwise. (J.S. App. 27A.) *See also Jimenez v. Weinberger, supra*, 523 F.2d at 703-04 (similarly construing parallel language in §204 (42 U.S.C. §404)).

Consistent with this interpretation of §1631(b), even the three cases holding §205 does not waive sovereign immunity, find no sovereign immunity bar to awarding relief almost identical to that granted here. As stated in *De Lao v. Califano*, 560 F.2d 1384, 1391 (9th Cir. 1977):

> . . . Congress has authorized retroactive payments to those who are found eligible after a hearing. It is only those found not eligible who will not get retroactive payments. Retroactive relief for them is barred by sovereign immunity.

See also Tatum v. Mathews, 541 F.2d 161, 166 n.5 (6th Cir. 1976); *Johnson v. Mathews*, 539 F.2d 1111, 1125

[16]The Secretary's regulations also contemplate the opportunity to recover underpayments. 20 CFR §§ 416.535-.543. These regulations are discussed *infra*, 64-65.

(8th Cir. 1976.)[17] And as in *Delao, Tatum* and *Johnson*, the district court limited retroactive payments to those appellee class members who proved at remand hearings they did not in fact abandon their United States residences. (J.S. App. 29A-30A.)

In addition to the absence of case support for his position (Sec. Bf., 28-31), the Secretary has repeatedly interpreted this statutory review scheme as a waiver of sovereign immunity. *See, e.g.*, Brief for Appellants in *Weinberger v. Salfi, supra*, at 17. He has done so throughout this case, both in the district court (R. 215) and here. In his brief in *Norton v. Mathews*, 427 U.S. 524 (1976) at 21, incorporated in his brief here at 10 n.6, he states:

> Under such a scheme, *every claimant* properly before the court who establishes a meritorious claim may obtain fully adequate relief without issuance of any injunciton restraining operation of the statute. If the claimants' contentions, *constitutional or otherwise*, are sustained, a judgment by the district court may reverse the decision of the Secretary and order the payment of benefits (or reconsideration of the claim under the proper standards). (emphasis added).

While a United States agent cannot waive sovereign immunity, the Secretary's consistent interpretation of these statutes is entitled to great weight since he is the department

[17]This is obviously not a suit for money damages, as the Secretary contends. Nor is it a suit to recover retroactive benefits for potentially ineligible persons as in *Delao, Tatum* and *Johnson*. In those cases, persons who had not yet been determined eligible for benefits sought retroactive payments for the period between their terminations and reaffirmations of ineligibility by the Secretary after a hearing. Those ineligible plaintiffs contended due process entitled them to benefits pending a hearing which redetermined ineligibility. But the due process clause is not a waiver of sovereign immunity.

head charged with their administration. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *United States v. City of Chicago*, 400 U.S. 8, 10 (1970); *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

The relief granted in this case does not require a specivic statute "stating that, if a portion of [another] statute prohibiting payment is declared invalid, then payment is deemed authorized." (Sec. Bf., 29.) Even if this were a suit for damages, which it is not (*see, supra*, 64 n.18), *United States v. Testan*, 424 U.S. 392, 400 (1976) only requires a federal statute that "can *fairly be interpreted* as mandating compensation by the Federal Government for the damage sustained." (emphasis added). The Secretary and the social security decisions cited above have so interpreted § § 205 and 1631. Thus, sovereign immunity does not bar the relief awarded by district court.[18]

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[18] *Edelman v. Jordan*, 415 U.S. 651 (1974) is not relevant. (Sec. Bf., 30-31.) There, this Court held, *inter alia*, that a state's participation in the federal-state Aid to the Aged, Blind and Disabled program ("AABD"), which on January 1, 1974 became the federal SSI program involved here (415 U.S. at 653 n.2), did not constitute a waiver of its Eleventh Amendment immunity from a federal court suit for retroactive welfare benefits. (*Id.*, 671-72.) The basis for its ruling was that under the federal statutes authorizing the AABD program, a ". . . congressional authorization to sue a class of defendants which literally includes States is wholly absent." (*Id.*, 672.) Congress has specifically authorized suits in federal court against the Secretary to review and recover erroneously denied SSI benefits. Sections 205(g), 1631(b), (c), 42 U.S.C. §§ 405(g), 1383(b), (c). The *Edelman* decision was limited to the narrow waiver of Eleventh Amendment immunity, and not the broader waiver of sovereign immunity. *Martinez v. Marshall*, 573 F.2d 555, 560 (9th Cir. 1978); *Rhodes v. Weinberger*, 388 F.Supp. 437, 442 (E.D. Pa. 1975.)

III.

THE DISTRICT COURT IMPROPERLY DENIED RELIEF TO APPELLANT CLASS MEMBERS.

A. All Class Members Proceeding As A Certified Class Under § § 205(g) And 1631(c)(3) Of The Act Are Statutorily Entitled To Judicial Relief And The Opportunity To Recover Unconstitutionally Denied Benefits.

The district court refused all relief to the appellant class members. By the class definition (J.S. App. 34A-35A), all these class members had effectively submitted timely claims for relief in the district court under § § 205(g) and 1631(c)(3), and were denied their SSI entitlement by virtue of § 1611(f). Appellant class members belong to one of two subclasses: (1) eligible individuals not having current applications for SSI on the date of the district court's final order (August 23, 1977); and (2) individuals no longer eligible for SSI on that date. (J.S. App. 31A.) By denying relief to these class members, the court effectively imposed on them additional requirements for securing judicial relief and recovery of underpayments pursuant to § § 205(g) and 1631(b), (c)(3), that are nowhere found in these statutes and indeed conflict with them. That decision, unless reversed, will severely restrict judicial relief under the SSI program.

As explained *supra*, 61-63, § § 205(g) and 1631(b) and (c) set out each SSI recipient's rights to obtain administrative and judicial review of the Secretary's unconstitutional

benefit denials under §1611(f) and to recover improper underpayments. By necessity, each recipient's claim is that he was constitutionally entitled to the payment *at the time* the Secretary refused to pay it. The district court correctly noted that §1631(b) implements the Congressional intent that SSI beneficiaries "receive the full and correct amount of their entitlements, even if this requires payments to be made long after the period of entitlement." (J.S. App. 27A, quoting *Jimenez v. Weinberger, supra*, 523 F.2d at 704.)

Nothing in the Act or the Secretary's regulations permits a court to refuse relief to an individual SSI claimant after concluding the Secretary denied him benefits pursuant to an unconstitutional statute. The Secretary's regulation states that:

> A person's right to supplemental security income payments—how much he gets and under what conditions—are clearly defined in the law. 20 C.F.R. §416.110(b).

Specifically, nothing in the Act or regulations permits a court to deny relief to a claimant properly proceeding under §§205 and 1631(c)(3) because he does not have a current application for benefits (appellant subclass 1) or because he is no longer eligible for SSI (appellant subclass 2) when the court renders its decision. Pursuant to 20 C.F.R. §416.536, underpayments occur only during periods for which a claimant "filed [an] application" and "met" SSI eligibility conditions. There is no requirement that he be filing an SSI application or be eligible therefor when a reviewing court renders its decision. Moreover, the underpayment period runs, and the "fact of underpayment" becomes established, during all months "for which there is a difference between the amount paid and the amount due."

20 C.F.R. §416.538. There is no requirement that any SSI be due to the claimant for the month when the court renders its decision. Indeed, 20 C.F.R. §416.542(a) provides for disbursing underpayments in a "separate payment" in such situations.

Together, §§205(g) and 1631(b), (c), and 20 C.F.R. §§416.536, 416.538 impose obligations (1) on the district court, at least to grant a remand for an administrative rehearing to an individual otherwise eligible for SSI when benefits were illegally denied, and (2) on the Secretary to pay those wrongfully denied benefits to such an individual. The district court could not condition such obligations on an individual's eligibility for SSI or pending SSI application on the date of judicial decision, since to do so would create an additional eligibility requirement unauthorized by the Act.[19]

Individual claimants who happen to be class members satisfying all requirements of §§205(g) and 1631(c)(3) have the same rights to judicial review and recovery of underpayments as all other individuals. The district court properly ruled that class actions are permitted under sections 205(g) and 1631(c)(3).[20] The Secretary does not

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[19] *Cf. Carleson v. Remillard*, 406 U.S. 598, 600 (1972); *Townsend v. Swank*, 404 U.S. 282, 286 (1971); *King v. Smith*, 392 U.S. 309, 333 (1968). These cases rely on Congressional legislative history in holding that states cannot impose additional eligibility requirements unauthorized by federal statute.

[20] *See, e.g., Liberty Alliance v. Califano*, 568 F.2d 333, 346-47 (3rd Cir. 1977); *Wilson v. Edelman*, 542 F.2d 1260, 1275 (7th Cir. 1976); *Tatum v. Mathews, supra*, 541 F.2d at 163-64; *Johnson v. Mathews, supra*, 539 F.2d at 1125-26; *Jimenez v. Weinberger, supra*, 523 F.2d at 694-96; *Oliver v. Califano*, CCH UIR ¶15,244 (C.D. Cal. 1977); *see also Norton v. Mathews, supra*, 427 U.S. at 533-38 (1976) (Stevens, Brennan, Marshall, J.J. dissenting) (Court did not reach the class certification issue, but dissent noted class actions proper).

contest that ruling here. (Sec. Bf., 9 n.6.) Consistent with the Court's opinions in *Mathews v. Eldridge*, 424 U.S. 319, 328-33 (1976) and *Mathews v. Diaz*, 426 U.S. 67, 74-76 (1976) and lower court decisions cited, *supra*, 68 n.20, the district court defined the class so that every member individually satisfied the judicial review requirements of §§205(g) and 1631(c)(3). The Secretary expressly concedes this point. (Sec. Bf., 8 n.6.)

Class certification under §§205(g) and 1631(c)(3) "conferred jurisdiction on the district court to hear [the timely claims] by each individual member of the class." *Johnson v. Mathews, supra*, 539 F.2d at 1126; *Jimenez v. Weinberger, supra*, 523 F.2d at 694, 695-96. Given such jurisdiction, courts uniformly grant back payment relief to *all* class members denied benefits solely by virtue of unconstitutional statutes (*Jimenez v. Weinberger, supra*, 523 F.2d at 704; *Griffin v. Richardson, supra*, 346 F. Supp. at 1230; *Morris v. Richardson*, 346 F. Supp. 494, 500 (N.D. Ga. 1972) (three-judge court), *vac. and remanded on other grounds*, 409 U.S. 464 (1973); *Oliver v. Califano, supra*) or the opportunity to obtain such relief at an administrative hearing. *Tatum v. Mathews, supra*, 541 F.2d at 166 n.5; *Johnson v. Mathews, supra*, 539 F.2d at 1125.

The foregoing statutes, regulations and cases establish appellant class members' entitlement to relief under the Social Security Act, as a matter of right. The district court cited no statute, regulation or social security case to support its denial of relief. It relied solely on *Rothstein v. Wyman*, 467 F.2d 226, 235 (2nd Cir. 1972), *cert. denied*, 411 U.S. 921 (1973), which held that under the Aid to Families With Dependent Children program, 42 U.S.C. §601 *et seq.*, a

court is not required to order a state to make retroactive payments to class members illegally denied AFDC benefits. But the AFDC statutory scheme is so fundamentally different from the SSI program that *Rothstein* is simply inapplicable in resolving the class relief question here. First, no statute required states to restore AFDC payments wrongfully denied. *See Jimenez v. Weinberger, supra*, 523 F.2d at 704 n.33. In contrast, §1631(b) and implementing regulations require such payments to SSI beneficiaries. Second, Congress did not specifically authorize suits in federal court to review illegal AFDC denials; the claim to recover the payments in *Rothstein* was based upon the Court's pendent jurisdiction. Under the SSI program, Congress specifically authorized suits in federal court to review SSI denials, pursuant to §§205(g) and 1631(c)(3). Third, because Congress has placed a sixty-day limitation period on seeking judicial review in SSI cases, there is neither need nor room for district courts to guess, as in *Rothstein*, whether recovery of underpayments "would become compensatory rather than remedial." (J.S. App. 31A.) Given these basic distinctions between the two statutory schemes, the district court had no discretion to consider any so-called equitable factors in determining whether to grant appellants the relief requested.

B. The District Court Abused Any Discretion It Had In Denying Relief To Appellant Class Members.

Assuming, arguendo, that the district court had some discretion to weigh equities in determining whether to grant

appellants relief, refusing all relief was an abuse of discretion.

(1) *Subclass eligible for SSI on the order date but not applying for it at that time.* The district court recognized the possibility that "these persons are indeed needy." (J.S. App. 31A-32A.) Thus, granting relief to this subclass would serve the court's articulated purpose of the SSI program: "to help those who are currently needy." (*Id.*, 31A.) In fact, denying relief to this group penalized them twice: first for exercising their right to travel and second, for attempting to survive without governmental assistance despite their age, disability, or blindness.[21] One can only speculate why these appellants did not re-apply for SSI, but as this Court noted in *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970):

> . . . [Public assistance] provides the means to obtain essential food, clothing, housing, and medical care . . . [T]ermination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. *His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.* (emphasis added and in original and footnote omitted).

Despite these factors, the court denied relief to this subclass, asserting:

> It would impose a completely unrealistic and undue

[21]This Court has noted that public assistance "is given to persons on the very margin of subsistence . . ." *Mathews v. Eldridge, supra,* 424 U.S. at 340.

> burden on the defendant to expect him to determine who these persons might be. (J.S. App. 32A.)

This reasoning is factually incorrect. The Secrtary admitted that he can identify *all* persons who were unconstitutionally denied benefits pursuant to §1611(f) (R. 707.) He made no distinction between identifying this subclass and all other class members. Indeed, he could make no such distinction, since the computer code, identifying recipients denied SSI pursuant to the unconstitutional statute, lumps all such people into one category. (*Id.*, 708.)

The district court's reasoning also conflicts with other parts of its decision. It rejected the Secretary's "administrative burden" argument for avoiding back payments to other class members because: (a) he conceded that the requested class relief would not require reducing the scope of SSI beneficiaries; (b) his administrative burden argument is only a factually unsupported "assertion;" and (c) administrative costs alone are insufficient cause for denying unconstitutionally suspended public entitlements. (J.S. App. 27A-28A.) *See also Jimenez v. Weinberger, supra,* 523 F.2d at 704. These reasons apply equally to this subclass of admittedly poor persons eligible for SSI.

(2) *Subclass no longer eligible for SSI on the order date.* The district court denied relief to this subclass because:

> [R]etroactive payments should go to only those who were unconstitutionally denied benefits in the past, but who are still *currently needy*, and thus still eligible for SSI benefits. If a person is not presently needy, then there would be no purpose served by granting him retroactive benefits. In such a situation, it would appear that the payments would 'become compensatory rather than remedial' (quoting *Rothstein v.*

Wyman, supra) (J.S. App. 31A) (emphasis in original).

This reasoning, like that applied to the first subclass, conflicts with the court's earlier recognition that the Secretary's unconstitutional denials:

> necessarily required the plaintiff class members to consume other assets in order to attempt to maintain their standard of living, while at the same time exercis[ing] their right to travel. (J.S. App. 26A.)

Thus, granting the opportunity to other class members to recover unconstitutionally denied SSI served the purpose of compensating them for their injuries. *See Jimenez v. Weinberger, supra*, 523 F.2d at 703; *Goldberg v. Kelly, supra*, 397 U.S. at 264. Merely because the members of this subclass would not qualify for SSI on August 23, 1977 does not negate their earlier injury shared with all other class members. Just because these appellants have by no one means or another managed to ward off starvation pending receipt of the SSI to which they were previously entitled provides no reason for refusing relief. To hold otherwise would provide a money saving device for governments at the expense of those of our citizenry least able to bear that burden.

Nor can the district court simplistically rely on *Rothstein v. Wyman, supra*, to determine that granting relief to this subclass would be "compensatory rather than remedial." As noted at *supra*, 70, district courts have no room in SSI litigation, as they did in AFDC cases, to guess when recovery of underpayments becomes compensatory: §§205(g) and 1631(c)(3) provide a bright-line period for SSI claimants to seek such recovery through judicial review. All members of this subclass met this period by class definition, as the Secretary concedes.

For these reasons, the district court abused any discretion it might have had to determine the availability of relief to the appellant class members.

CONCLUSION

The district court's judgment should be affirmed in No. 77-991 and reversed in No. 77-5999. Should this Court decide that the first sentence of §1611(f) is constitutional and the second sentence of §1611(f) unconstitutional, the district court's judgment should be affirmed in part in No. 77-991 and appropriately reversed in No. 77-5999.

Respectfully submitted,

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